



In the Matter of the Appeal of)
)
ROBERT G. AND JEAN C. SMITH)

For Respondent: John A. Stilwell, Jr.
Counsel

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Appeal of Robert G. and Jean C. Smith

The issues for determination are the following: (i) Is the subject proposed assessment barred by the statute of limitations; (ii) If not so barred, is respondent's determination of deficiency based upon a federal audit report entitled to a presumption of **correctness** so that the burden is on Robert G. and Jean C. Smith (hereinafter referred to as "appellant-husband" and "appellant-wife," respectively, and collectively referred to as "appellants") to establish that it is erroneous; (iii) Did respondent properly assess a 20 percent penalty against appellants for delinquent filing of their joint California personal income tax return for the year in issue; and (iv) Whether this board has the requisite subject matter jurisdiction to decide whether appellant-husband's adjudication of bankruptcy in 1977 discharged his California personal income tax liability for 1969.

On October 15, 1970, appellants filed their joint California personal income tax return for 1969; respondent had previously extended the due date for the filing of their return to June 15, 1970. In 1973, respondent received a report from the Internal Revenue Service which disclosed several adjustments to the taxable income reported on appellant's 1969 joint federal income tax return. The federal adjustments resulted in the addition of \$22,124 to appellants' taxable income for the year in issue. Since state and federal law are substantively identical with respect to the adjustments made to appellants' 1969 federal return, respondent adopted those adjustments for purposes of appellants' 1969 California return. Appellants, by now divorced, were issued the subject proposed assessment on January 30, 1974.

On October 23, 1973, appellant-wife filed a petition with the United States Tax Court in which she contested the disallowance of a \$19,124 deduction for certain-unreimbursed employee expenses incurred by her former husband in 1969. The other federal adjustments, resulting in an additional \$3,000 to appellants' taxable income in 1969, were not contested. On August 19, 1975, the court entered judgment on appellant-wife's petition; the federal adjustments to appellants' 1969 taxable income were upheld. Respondent subsequently affirmed its proposed assessment which, in accordance with the federal action, included a five percent negligence penalty. Independent of federal action, respondent also imposed a 20 percent penalty for delinquent filing.

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Appellants' initial argument is that respondent's action in this matter is barred by the statute of limitations. A review of the record on appeal reveals that this assertion is without merit. The basic statute of limitations for deficiency assessments is found in section 18586 of the Revenue and Taxation Code, which provides:

Except in case of a fraudulent return and except as otherwise expressly provided in this part, every notice of a proposed deficiency assessment shall be mailed to the taxpayer within four years after the return was filed. No deficiency shall be assessed or collected with respect to the year for which the return was filed unless the notice is mailed within the four-year period or the period otherwise fixed. (Emphasis added.)

As previously noted, appellants' 1969 state return was filed on October 15, 1970, and respondent issued the subject proposed assessment on January 30, 1974. Since the proposed assessment was issued by respondent within four years of the date on which appellants filed their 1969 California return, **respondent's** action in this matter is not barred by the statute of limitations. It should be noted, moreover, that since the final federal determination of the adjustments to appellants' taxable income was not issued until August 19, 1975, respondent was not limited by the four year statute of limitations set forth in section 18586. (See Rev. & Tax. Code, §§ 18586.2 and 18586.3.)

With regard to the second issue presented by this appeal, it is well settled that a deficiency assessment based on a federal audit report is presumptively correct (see Rev. & Tax. Code, § 18451) and that the taxpayer bears the burden of proving that respondent's determination is erroneous. (Appeal of Donald G. and Franceen Webb, Cal. St. Bd. of Equal., Aug. 19, 1975; Appeal of Nicholas H. Obritsch, Cal. St. Bd. of Equal., Feb. 17, 1959.) While appellants claim that the \$19,124 deduction for unreimbursed employee expenses was improperly disallowed by federal authorities, they have offered no tangible evidence substantiating that contention. Consequently, we must conclude that appellants have failed to carry their burden of proof and that respondent's **determination of deficiency** based upon the federal audit report be sustained. The presumption of correctness which attaches to respondent's determination

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under these circumstances, also applies with respect to the imposition of the five percent negligence penalty imposed under section 18684 of the Revenue and Taxation Code. (Appeal of Casper W. and Svea Smith, Cal. St. Bd. of Equal., April 5, 1976; Appeal of Robert R. Ramlose, Cal. St. Bd. of Equal., Dec. 7, 1970.)

The next issue is whether appellants were properly assessed a 20 percent penalty for late filing of their 1969 California personal income tax return. In pertinent part, Revenue and Taxation Code section 18681, subdivision (a), provides as follows:

(a) If any taxpayer fails to make and file a return required by this part on or before the due date of the return or the due date as extended by the Franchise Tax Board, then, unless it is shown that the failure is due to reasonable cause and not due to willful neglect, 5 percent of the tax shall be added to the tax for each month or fraction thereof elapsing between the due date of the return and the date on which filed, but the total penalty shall not exceed 25 percent of the tax. ... (Emphasis added.)

As previously indicated, the due date of appellants' 1969 California return, as extended by respondent, was June 15, 1970; appellants filed their return four months later on October 15, 1970. Since appellants have provided no evidence of reasonable cause, we **must conclude that respondent's imposition of a 20 percent late filing penalty was proper.** (Appeal of Carl H., Jr. and Madonna Gross, Cal. St. Bd. of Equal., Aug. 16, 1979; Appeal of Clyde L. and Josephine Chadwick, Cal. St. Bd. of Equal., Feb. 15, 1972.)

At the oral hearing on this appeal, appellant-husband argued that his California personal income tax liability for 1969 was discharged on January 20, 1977, when he was adjudicated bankrupt. In response to appellant-husband's contention, respondent argues that this board lacks jurisdiction to decide whether income tax deficiencies and penalties have been discharged by an adjudication of bankruptcy. We agree with respondent that this is not an issue properly raised before this board. Appellant-husband's argument pertains solely to the collectability of his tax liability; it has no relationship to the propriety of respondent's action in this matter. In exercising its jurisdiction to review

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respondent's actions, this board cannot discharge taxes as might a bankruptcy court. (See Fotochrome, Inc., 57 T.C. 842 (1972).) Accordingly, we conclude that this board lacks the requisite subject matter jurisdiction to decide whether appellant-husband's California personal income tax liability for 1969 was discharged by virtue of his 1977 bankruptcy adjudication. That is a matter which falls within the general jurisdiction of the bankruptcy court. (See Ralph B. Graham, Jr., 75 T.C. No. 33 (Jan. 12, 1981).)

For the above reasons, respondent's **action** in this matter will be sustained.

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O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 18595 of the Revenue and Taxation Code, that the action of the **Franchise Tax** Board on the protest of Robert G. and Jean C. Smith against a proposed assessment of additional personal income tax and penalties in the total amount of **\$2,764.87** for the year 1969, be and the same is hereby sustained.

Done at Sacramento, California, ~~this~~27th day
of October , 1981, by the State Board of Equalization,
with Board Members Mr. Dronenburg, Mr. Bennett and
Mr. Nevins present.

Ernest J. Dronenburg, Jr. , Chairman

William M. Bennett, Member

Richard Nevins, Member

_____, Member

_____, Member